EU FINANCE BHD.

v.

ONG KAY PEAW

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. D-23-1526-87]
12 DECEMBER 1988

CIVIL PROCEDURE: *Application to set aside summary judgment in default - Factors to consider - Whether solicitor's explanation for his absence acceptable - Whether any merits shown in defence.*

This was an application to hear further arguments in Open Court on an application to set aside the summary judgment in default entered against the defendant. The defendant's solicitors had failed to appear before the Senior Assistant Registrar on 8 December 1987, when the O. 14 application was fixed for hearing and in their absence, summary judgment in default was entered against the defendant.

Held:

[1] In his application to have the summary judgment in default set aside, all that the defendant needs do is to give (1) an acceptable explanation for his solicitor's absence on 8 December 1987 wherein the O. 14 application was allowed in his absence and (2) show evidence of some merits on his defence.

[2] Since the purpose of the instant application was to have the O. 14 application re-heard on its merits but since the defendant had not filed any affidavit opposing the O. 14 application and that the only issue raised has been satisfactorily dealt with by affidavit evidence, no purpose can be seen in allowing the defendant's application to have the summary judgment in default set aside.

[Application dismissed with costs.]

Legislation referred to:
Rules of the High Court 1980, O. 14

For the defendant/applicant - S.T. Lee; M/s. S.T. Lee & Partners
For the plaintiff/respondent - Maniraj; M/s. Yap Kamaluddin & Partners

JUDGMENT

Siti Norma Yaakob J:

In this claim for the return of a housing loan granted by the plaintiff to the defendant, the plaintiff had proceeded to enter final judgment, under O. 14 against the defendant.

The defendant's solicitors however failed to appear before the Senior Assistant Registrar on 8 December 1987, when the O. 14 application was fixed for hearing and in their absence, summary judgment in default was entered against the defendant.

On 17 December 1987, the defendant filed an application, *inter alia*, to have the summary judgment in default set aside and this was fixed before me on 16 March 1988. On that date, after hearing both solicitors for both parties, I had dismissed the defendant's application

with costs. Not satisfied with my decision, the defendant then applied to have the application adjourned into Open Court for further arguments. I allowed this application for further arguments and the instant appeal is against the order I had made in Open Court.

For his application to have *inter alia*, the summary judgment in default set aside, all that the defendant needs do is to give (1) an acceptable explanation for his solicitors's absence on 8 December 1987 wherein the O. 14 application was allowed in his absence and (2) show evidence of some merits on his defence.

Mr. Lee Seng Huat, the solicitor, who is personally responsible for the conduct of the defendant's case affirmed that he was present in Court on the morning of 8 December 1987 but upon realising that his application was listed as no. 32 in the Senior Assistant Registrar's list, requested a clerk to have his matter stood down to 11.00 a.m. and he then left to attend to other matters in the other Courts. However, upon his return to the Senior Assistant Registrar's chambers at 11.00 a.m., he was informed that his case had been called ahead of its turn and judgment in default entered in his absence.

I accepted solicitor's explanation for his absence.

In the same affidavit he has also averred that the defendant has a good defence on the merits but unfortunately, apart from a bare averment, has not stated what such defence is. However, the defendant has filed a statement of defence wherein he has alleged that the plaintiff had breached the loan agreement dated 11 February 1985 by making an unauthorised payment of RM30,300 to the developers for works which were never completed by the developers.

In reply the plaintiff has exhibited the architect's certificate dated 13 January 1986, confirming that the particular works which had been alleged by the defendant to be incomplete, have been duly completed and advising the developers that they may request their purchasers to make the progress payments in accordance with the sale and purchase agreements they had entered with the purchasers. It was pursuant to this certification that the plaintiff released the sum of RM30,300 from out of the loan fund on behalf of the defendant to the developers on 4 February 1986.

This was the only issue raised by the defendant in his statement of defence and he has not filed any affidavit in reply to the O. 14 application. Since the purpose of the instant application was to have the O. 14 application re-heard on its merits but since the defendant had not filed any affidavit opposing the O. 14 application and that the only issue raised in his statement of defence has been satisfactorily dealt with by affidavit evidence, I did not see the purpose of allowing the defendant's application to have the summary judgment in default set aside and to that end, I had accordingly affirmed my earlier decision made in Chambers by dismissing the defendant's application with costs.

Also found at [1989] 2 CLJ 165